U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 August 2007

Case No.: 2004-BLA-6577

In the Matter of:

D.B.,
Claimant

v.

ANNE BROOKE COAL CORPORATION,
Employer

EMPLOYERS INSURANCE OF WAUSAU,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Edmond Collett, Esq.
Edmond Collett, P.S.C.
Hyden, Kentucky
For the Claimant

Carl Brashear, Esq.
Hoskins Law Office
Lexington, KY
For the Employer

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901, *et seq.* The Act and implementing regulations, 20 CFR Parts 410, 718, 725, and 727, provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and regulations define pneumoconiosis, commonly known

as black lung disease, as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b); 20 CFR § 718.201 (2007). In this case, the Claimant alleges that he is totally disabled by pneumoconiosis.

I conducted a hearing on this claim on April 4, 2006, in Hazard, Kentucky. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18 (2007). The Director of the Office of Workers Compensation Programs (OWCP) was not represented at the hearing. The Claimant was the only witness. Transcript ("Tr.") 9 - 24. Director's Exhibits ("DX") 1-43 and Claimant's Exhibit ("CX") 1 were admitted into evidence without objection. Tr. 6-7. The record was held open after the hearing to allow the parties to submit closing arguments. The Claimant and Employer submitted post-hearing briefs.

In reaching my decision, I have reviewed and considered the entire record of the claim before me, including all exhibits, the testimony at hearing, and the arguments of the parties.

PROCEDURAL HISTORY

The Claimant filed his initial claim on January 18, 1996. The claim was denied by Administrative Law Judge Daniel J. Roketenetz, who found that the Claimant suffered from coal workers' pneumoconiosis, but that he had failed to establish that he was totally disabled due to a respiratory or pulmonary impairment. Accordingly, the claim was denied. The Benefits Review Board affirmed Judge Roketenetz' Decision on September 29, 2000. DX 1.

The Claimant filed this subsequent claim on August 4, 2003. DX 3. The Director issued a proposed Decision and Order denying benefits on April 14, 2004. DX 35. The Claimant appealed on April 19, 2004. DX 36. The claim was referred to the Office of Administrative Law Judges for hearing on July 16, 2004. DX 41.

APPLICABLE STANDARDS

This claim relates to a "subsequent" claim filed on August 4, 2003. Because the claim at issue was filed after March 31, 1980, and after January 19, 2001, the effective date of the current regulations, the current regulations at 20 CFR Parts 718 and 725 apply. 20 CFR §§ 718.2 and 725.2 (2007). Pursuant to 20 CFR § 725.309(d) (2007), in order to establish that he is entitled to benefits, the Claimant must demonstrate that "one of the applicable conditions of entitlement … has changed since the date upon which the order denying the prior claim became final" such that he now meets the requirements for entitlement to benefits under 20 CFR Part 718. In order to establish entitlement to benefits under Part 718, the Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling. 20 CFR §§ 718.1, 718.202, 718.203, 718.204, and 725.103 (2007). I must consider the new evidence and determine whether the Claimant has proved at least one of the elements of entitlement previously decided against him. If so, then I must consider whether all of the evidence establishes that he is entitled to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994).

ISSUES

The issues contested by the Employer, or by the Employer and the Director, OWCP, are:

1. Whether the claim was timely filed.

2. Whether the Claimant is a miner.

3. Whether the Claimant worked as a miner after December 31, 1969.

4. How long the Claimant worked as a miner.

5. Whether the Claimant's pneumoconiosis arose out of coal mine employment.

6. Whether he is totally disabled.

7. Whether his disability is due to pneumoconiosis.

8. Whether the named Employer is the Responsible Operator.

9. Whether the named Employer has secured the payment of the benefits.

10. Whether the evidence establishes a material change in conditions pursuant to 20 CFR § 725.309 (2007).

DX 41; Tr. 5. The Employer also reserved its right to challenge the statute and regulations. DX 25; Tr. 5-6.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and the Claimant's Testimony

At the hearing, the Claimant testified that he was 64 years old. Tr. 9. He has an eighth-grade education. He is married and does not have any children who are under 18 or dependent on him. Tr. 10. I find that he has one dependent, his wife, for the purpose of augmenting benefits.

In his claim for benefits, the Claimant stated that he worked in or around coal mines for 15 to 20 years. DX 2. He testified that he worked mostly as a drill operator at a surface mine, where he was exposed to both coal and rock dust on a regular basis. Tr. 11-12. He was also exposed to dust when he helped sweep the coal dust into pits. Tr. 12-13. The Claimant's last coal mine employment was in 1993, for Anne Brooke Coal, in Kentucky. Therefore, this claim is governed by the law of the Sixth Circuit. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (*en banc*).

The Claimant used to smoke, but quit eight or nine years before the hearing. He smoked for 35-40 years, 15-20 cigarettes per day. Tr. 11. At the hearing on his previous claim, he testified that he stopped smoking when he had had his heart attack in January 1998. DX 1;

Tr. 21, 34. Based on his testimony and the medical reports, I find that he had a 40 pack-year smoking history.

The Claimant testified that he quit working in 1993 because of the dust. Tr. 14. He stated that he was also experiencing problems with his back. Later he developed problems with his heart. He had a heart attack and heart surgery in 1998. Tr. 23. He applied for and was awarded Social Security Benefits based on these health problems. Tr. 15. According to the Claimant, his breathing has continued to worsen from the time he left employment as a coal miner. He is currently being treated with an inhaler and a Nebulizer at least three times a day. The Claimant complained of shortness of breath and difficulty walking even short distances, and climbing stairs. Tr. 16-17. He also has trouble sleeping because he smothers. Tr. 17-18. He said that even without his other medical problems, he would be unable to go back to work as a coal miner because of his breathing. Tr. 19. Dr. Varghese treats him for his breathing. Tr. 22-23.

Status as Miner

The 1977 amendments state that the purpose of the Act is to provide benefits, in cooperation with the states, to miners who are totally disabled due to coal workers' pneumoconiosis, and to surviving dependents of miners whose death was due to such disease. 30 U.S.C. § 901(a). Thus, a prerequisite to establishing entitlement to benefits is proving that the claim is on behalf of a coal miner or a survivor of a coal miner. The amended regulations provide the following definition of a miner:

> (19) Miner or coal miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202). For purposes of this definition, the term does not include coke oven workers.

20 C.F.R. § 725.101(a)(19) (2007). In addition, the new regulations provide a rebuttable presumption that certain individuals are miners, as follows:

> (a) Miner defined. A 'miner' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. *There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner.* This presumption may be rebutted by proof that:
>
> > (1) The person was not engaged in the extraction, preparation, or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or

> (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

20 CFR § 725.202(a) (2007) (emphasis added). The Sixth Circuit Court of Appeals has described a two-pronged test to determine whether a claimant is a miner:

> First, the individual must have worked 'in or around a coal mine' (situs requirement) and, second, that work must have been in the 'extraction or preparation of coal' (function requirement).

Director, OWCP v. Consolidation Coal Co. [Petracca], 884 F.2d 926,929 (6th Cir. 1989) (Citations omitted.)

In this case, the Claimant testified that he worked for the Employer until 1993 as a drill operator at a surface mine, and gave similar information on his work history form. Tr. 11; DX 5. Therefore, I find that the Claimant has provided evidence showing that he met both prongs of the test. Although the Employer contested this issue, it has not presented any evidence or argument to rebut the presumption that the Claimant was a miner. I conclude that that he was a miner within the meaning of the Act and the regulations, as he worked at a mine extracting coal. In addition, as he worked for the Employer in 1993, I also find that he worked in the mines after December 31, 1969.

Timeliness

The purpose of the regulation allowing the filing of subsequent claims, 20 CFR § 725.309 (2007), is "to provide relief from the ordinary principles of finality and res judicata to miners whose physical condition deteriorates." *Lukman v. Director, OWCP*, 896 F.2d 1248, 1253 (10th Cir. 1990). The Benefits Review Board has held that there is no statute of limitations or time limit for filing a subsequent claim. *Andryka v. Rochester Pittsburgh Coal Co.*, 14 B.L.R. 1-34 (1990). This view is not universally accepted by the Courts. *Compare Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1507 (10th Cir. 1996) ("… a final finding by an … adjudicator that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations."); *Westmoreland Coal Co. v. Amick*, 2004 WL 2791653, (4th Cir. 2004) (unpub.) (rejecting the Board's view, but agreeing with *Wyoming Fuel*); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608 (6th Cir. 2001) ("The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and … may only be turned back if the miner returns to the mines after a denial of benefits.") (Emphasis in original).

In this case, there is no evidence that the Claimant has ever been told that he is totally disabled by pneumoconiosis. In his initial 1996 claim, four of five doctors specifically stated that the Claimant retained the respiratory capacity to perform his usual coal mine employment. DX 1. The fifth doctor who gave an opinion, Dr. Baker, noted that the Claimant's impairments were mild, and never specifically said that Claimant was totally disabled. DX 1. In the current claim, no physician has stated that the Claimant does not retain the pulmonary or respiratory capacity to return to his coal mine work. The Employer has not offered any evidence or

argument on this issue. Therefore, I find that the Claimant's subsequent claim filed on August 4, 2003, is timely.

Length of Coal Mine Employment

The Claimant alleges 15 to 20 years of coal mine employment. DX 3. According to the Employment Histories the Claimant submitted to the Department of Labor and the Social Security records, the Claimant began working in the mines in 1959. He left the mines in 1993. The District Director made a finding of 14 years of coal mine employment. DX 35. The exhibits include the Claimant's Social Security earnings report, W-2 Forms for the years 1979-89 and 1991-93, and employment questionnaires. DX 4-9. In determining the length of the miner's coal mine employment, the Administrative Law Judge may apply any reasonable method of calculation. *See Clark v. Barnwell Coal Co.*, 22 B.L.R. 1-275, 1-280 - 1-281, BRB Nos. 01-0876 BLA and 02-0280 BLA (Apr. 30, 2003). Based on the Claimant's testimony and the Social Security records, I find that the Claimant was a coal miner, as that term is defined by the Act and regulations, for at least 16 years.

Responsible Operator

The Employer, Anne Brooke Coal Co., contested the issue of whether it is the responsible operator. The Claimant testified that he worked Anne Brooke for four or five months. Tr. 14. However, he also worked for Base Enterprises, Sheena Coal Co., and CRC Enterprises, all at the same mine site. Only the name changed. Tr. 14, 19-20; *see also*, DX 1 (Tr. 30, 34-36). Judge Roketenetz found, and the Benefits Review Board affirmed, that Anne Brooke was the responsible operator. The Employer did not submit any evidence or argument on this issue in the current claim. I find that the evidence supports the conclusion that Anne Brooke Coal Co. was a successor to Base Enterprises, and is liable as a successor operator pursuant to 20 CFR §§ 725.491, .492 and .493 (2007).

Employer's Ability to Pay

The regulations at 20 C.F.R. § 725.492(a)(4)(2007) provide that the operator or employer must be capable of assuming its liability for the payment of continuing benefits pursuant to the methods enumerated therein. In the absence of evidence to the contrary, a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability. 20 C.F.R. § 725.492(b)(2007). The methods listed for an operator to provide payment of benefits include obtaining a policy or contract of insurance, qualifying as a self-insurer, or possessing assets available for the payment of benefits. 20 C.F.R. § 725.606 (2007). The regulations also outline penalties for an employer's failure to insure or otherwise secure the payment of benefits. 20 C.F.R. § 725.495(2007). The Employer must provide evidence establishing that it lacks appropriate insurance coverage, is not self-insured, and possesses insufficient assets to assume liability.

In this case, the Employer has not submitted any evidence establishing that it lacks insurance coverage, is not self-insured, or that it possesses insufficient assets. In fact, the case has been defended by counsel for the Employer and its insurer, Wausau Insurance Companies. DX 25. Therefore, I find that the Employer is capable of assuming its liability for the payment of continuing benefits.

Change in Conditions

In a subsequent claim, the threshold issue is whether one of the applicable conditions of entitlement has changed since the previous claim was denied. The Claimant's previous claim was denied by the Benefits Review Board on September 9, 2000, and the denial became final one year later. The first determination must be whether the Claimant has established with new evidence that he suffers from a totally disabling pulmonary or respiratory impairment significantly related to or aggravated by dust exposure. Absent a finding that he suffers from such an impairment, none of the elements previously decided against him can be established, and his claim must fail because a living miner cannot be entitled to black lung benefits unless he is totally disabled based on pulmonary or respiratory impairments. Nonrespiratory and nonpulmonary impairments are irrelevant to establishing total disability for the purpose of entitlement to black lung benefits. 20 CFR § 718.204(a) (2007); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994); *Beatty v. Danri Corp*., 16 B.L.R. 1-11, 1-15 (1991), *aff'd*. 49 F.3d 993 (3d Cir. 1995). As will be discussed in detail below, the medical evidence filed in connection with his current claim does not establish that the Claimant has any pulmonary or respiratory impairment which is totally disabling. Thus, I find that he has not established that a change in one of the applicable conditions of entitlement has occurred. It follows that I do not need to address the evidence in the record from his previous claim in explaining my decision that he is not entitled to benefits.

Medical Evidence

Chest X-rays

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The following table summarizes the x-ray findings in connection with the current claim. X-ray interpretations submitted by the parties in connection with the current claim were in accordance with the limitations contained in 20 CFR § 725.414 (2007).

The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may classified as round (p, q, r) or irregular (s, t, u), and may be evidence of "simple pneumoconiosis." Large opacities (greater than 1 cm) may be classified as A, B, or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 CFR § 718.102(b) (2007). An x-ray interpretation which made no reference to pneumoconiosis, positive or negative, given in connection with review of an x-ray film solely to determine its quality, is listed in the "silent" column.

Physicians' qualifications appear after their names. Qualifications have been obtained where shown in the record by curriculum vitae or other representations. Qualifications of

physicians are abbreviated as follows: B=NIOSH [1] certified B reader; BCR=Board-certified in Radiology. Readers who are Board-certified Radiologists and/or B readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n.16 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B readers need not be radiologists.

Date of X-ray	Read as Positive for Pneumoconiosis	Read as Negative for Pneumoconiosis	Silent as to the Presence of Pneumoconiosis
09/08/03	DX 13 Baker B ILO Classification 2/1		DX 14 Barrett BCR, B Read for quality only Quality 1 (Good)
02/10/04	DX 15 Broudy B ILO Classification 2/1		

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction or restriction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more severe the lung impairment. Tests most often relied upon to establish disability in black lung claims measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1), and maximum voluntary ventilation (MVV).

The following chart summarizes the results of the pulmonary function studies available in connection with the current claim. Pulmonary function studies submitted by the parties in connection with the current claim were in accordance with the limitations contained in 20 CFR § 725.414 (2007). "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 CFR § 718.204(b)(2)(i) (2007).

[1] NIOSH is the Federal Government Agency that certifies physicians for their knowledge of diagnosing pneumoconiosis by means of chest x-rays. Physicians are designated as "A" readers after completing a course in the interpretation of x-rays for pneumoconiosis. Physicians are designated as "B" readers after they have demonstrated expertise in interpreting x-rays for the existence of pneumoconiosis by passing an examination.

Ex. No. Date Physician	Age Height[2]	FEV_1 Pre-/ Post	FVC Pre-/ Post	FEV_1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify?	Physician Impression
DX 14 9/8/03 Baker	61 70”	1.14	3.06	37%	N/A	Yes	Values show severe obstructive defect. Invalid tracings due to poor patient effort. Not acceptable due to suboptimal effort per Dr. Burki.
DX 14 11/03/03 Baker	62 69.5”	1.21	3.43	35%	N/A	Yes	Results show a severe obstructive defect. Invalid tracings due to poor patient effort. Not acceptable due to suboptimal effort per Dr. ? (illegible).
DX 15 2/10/04 Broudy	62 70”	1.21 1.05	3.15 2.96	38% 35%	28 32	Yes	Invalid due to variable effort

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (pO_2) and the percentage of carbon dioxide (pCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled.

The following chart summarizes the arterial blood gas studies available in connection with the current claim. Arterial blood gas studies submitted by the parties in connection with the current claim were in accordance with the limitations contained in 20 CFR § 725.414 (2007). A

[2] The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116 (4th Cir. 1995). As there is a variance in the recorded height of the Miner from 69.5” to 70”, I have taken the mid-point (69.75”) in determining whether the studies qualify to show disability under the regulations. The qualifying tests are qualifying to show disability whether considering the mid-point, or the heights listed by the persons who administered the testing.

"qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. 20 CFR § 718.105(b) (2007). Exercise studies were not administered in this case due to the Claimant's ischemic heart disease.

Exhibit Number	Date	Physician	PCO_2	PO_2	Qualify?	Physician Impression
DX 13	9/8/03	Baker	40	81	No	Normal
DX 15	2/10/04	Broudy	40.2	83.6	No	Normal

Medical Opinions

Medical opinions are relevant to the issues of whether the miner has pneumoconiosis, whether the miner is totally disabled, and whether pneumoconiosis caused the miner's disability. A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 CFR §§ 718.202(a)(4) (2007). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 CFR § 718.202(a)(4) (2007). Where total disability cannot be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contra-indicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, *i.e.*, performing his usual coal mine work or comparable and gainful work. 20 CFR § 718.204(b)(2)(iv) (2007). With certain specified exceptions not applicable here, the cause or causes of total disability must be established by means of a physician's documented and reasoned report. 20 CFR § 718.204(c)(2) (2007). The record contains the following medical opinions relating to submitted in connection with the current claim.

Dr. Glen Baker examined the Claimant on behalf of the Department of Labor on September 8, 2003. DX 13. Dr. Baker is Board-certified in Internal Medicine and Pulmonary Disease, and a B reader. CX 1. He took occupational, social, family and medical histories and conducted a physical examination, chest x-ray, blood gas studies, and pulmonary function testing. He reported that the Claimant worked in the mines for 15 or more years. He reported a smoking history of one pack per day for approximately 40 years. The chest examination was positive for pneumoconiosis. A pulmonary function test was administered and the results showed severe obstructive defect, but the effort by the Claimant was poor, rendering the results invalid. A second test was attempted on November 3, 2003, and again these results showed poor

effort on the part of the Claimant. Dr. Baker's test results were reviewed by Dr. Burki and another physician.[3] The arterial blood gas study was normal at rest. An exercise study was not performed due to the Claimant's ischemic heart disease. Based on these test results and the Claimant's work history, Dr. Baker diagnosed coal worker's pneumoconiosis and chronic bronchitis, both due to coal dust exposure and cigarette smoking; ischemic heart disease, status post coronary artery bypass graft due to arteriosclerotic heart disease; and, "? COPD with severe obstructive defect: effort was poor on PFTS." Dr. Baker could not state the degree of severity of the impairment due to the lack of effort on pulmonary function testing. He gave no opinion as to whether the Claimant retained the respiratory capacity to perform his last job in the mines.

Dr. Kirk Hippensteel reviewed Dr. Baker's report and test results at the request of the Employer and provided a report dated March 19, 2004. DX 16. Dr. Hippensteel is Board-certified in Internal Medicine and Pulmonary Disease, and a B reader. Dr. Hippensteel opined that the information in the Claimant's records was insufficient to diagnose whether any significant impairment from any cause was present. DX 16. The Claimant's poor effort on spirometry made his studies invalid. Dr. Hippensteel opined that none of the spirometry tests were useful as evidence of impairment. According to Dr. Hippensteel, the evidence in the Claimant's medical records did not show that the Claimant is unable from any cause to return to his previous job in the mines.

Dr. Bruce Broudy examined the Claimant on behalf of the Employer on February 10, 2004. DX 15. Dr. Broudy is Board-certified in Internal Medicine and Pulmonary Disease, and a B reader. He took occupational, social, family and medical histories and conducted a physical examination, chest x-ray, blood gas studies, and pulmonary function testing. He reported that the Claimant worked in the mines for almost 20 years as a drill operator. He reported a smoking history of one pack per day starting at the age of 18 and quitting six years before the examination. DX 15. On examination, the Claimant's chest was hyperresonant to percussion with decreased aeration. There was expiratory delay and slight wheezing. The chest x-ray was positive for pneumoconiosis, category 2/1, with no large opacities or pleural changes. The pulmonary function test suggested severe obstructive defect but the effort by the Claimant was "variable," rendering the results not technically valid. DX 15. The arterial blood gas study was normal at rest. Based on these test results and the Claimant's work history, Dr. Broudy diagnosed simple coal worker's pneumoconiosis due to the Claimant's years as a driller and chronic obstructive pulmonary disease due to the Claimant's cigarette smoking. The Claimant's variable effort with the pulmonary function test made interpretation difficult, but Dr. Broudy opined that little if any of the impairment on spirometry was related to his work as a coal miner. DX 15. Dr. Broudy gave no opinion as to whether the Claimant retained the respiratory capacity to perform his last job in the mines.

[3] I am unable to ascertain the name of the second physician due to illegible handwriting.

Existence of Pneumoconiosis

The regulations define pneumoconiosis broadly:

> (a) For the purpose of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical,' pneumoconiosis and statutory, or 'legal,' pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 CFR § 718.201 (2007).

In this case, the Claimant's medical records indicate that he has been diagnosed with chronic obstructive pulmonary disease and chronic bronchitis, which can be encompassed within the definition of legal pneumoconiosis. *Ibid*.; *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co*., 60 F.3d 173 (4th Cir. 1995). However, only chronic obstructive pulmonary disease caused by coal mine dust constitutes legal pneumoconiosis. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 515 (6th Cir. 2003); 65 Fed. Reg. 79938 (2000) ("The Department reiterates … that the revised definition does not alter the former regulations' … requirement that each miner bear the burden of proving that his obstructive lung disease did in fact arise out of his coal mine employment, and not from another source.").

Twenty CFR § 718.202(a) (2007) provides that a finding of the existence of pneumoconiosis may be based on: (1) chest x-ray; (2) biopsy or autopsy; (3) application of the

presumptions described in §§ 718.304 (irrebuttable presumption of total disability due to pneumoconiosis if there is a showing of complicated pneumoconiosis), 718.305 (not applicable to claims filed after January 1, 1982), or 718.306 (applicable only to deceased miners who died on or before March 1, 1978); or, (4) a physician exercising sound medical judgment based on objective medical evidence and supported by a reasoned medical opinion. There is no evidence that the Claimant has had a lung biopsy and, of course, no autopsy has been performed. None of the presumptions apply, because the evidence does not establish the existence of complicated pneumoconiosis, the Claimant filed his claim after January 1, 1982, and he is still living. In order to determine whether the evidence establishes the existence of pneumoconiosis, therefore, I must consider the chest x-rays and medical opinions. As this claim is governed by the law of the Sixth Circuit, the Claimant may establish the existence of pneumoconiosis under any one of the alternate methods set forth at § 202(a). *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 575 (6th Cir. 2000); *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (*en banc*).

Both available x-rays in the current claim are positive for pneumoconiosis, category 2/1. In addition, both of the physicians who examined the Claimant, Drs. Baker and Broudy, agree that he has pneumoconiosis. Dr. Hippensteel, who reviewed Dr. Baker's report, did not offer any diagnosis. Thus, the uncontradicted x-ray and medical opinion evidence support the conclusion that the Claimant has coal workers' pneumoconiosis, and I so find.

Causal Relationship Between Pneumoconiosis and Coal Mine Employment

The Act and the regulations provide for a rebuttable presumption that pneumoconiosis arose out of coal mine employment if a miner with pneumoconiosis was employed in the mines for 10 or more years. 30 U.S.C. § 921(c)(1); 20 CFR § 718.203(b) (2007). The Claimant was employed as a miner for at least 16 years, and is, therefore, entitled to the presumption. The Employer has not offered any evidence sufficient to rebut the presumption. Moreover, to the extent that the Claimant has legal, as opposed to clinical, pneumoconiosis, the causal relationship is established by the opinion of Dr. Baker. I conclude that the Claimant's pneumoconiosis was caused by his coal mine employment.

Total Pulmonary or Respiratory Disability

The Benefits Review Board previously affirmed Judge Roketenetz' finding that the Claimant suffers from coal workers' pneumoconiosis. DX 1. Therefore, the critical issue is whether the Claimant is totally disabled by a pulmonary or respiratory condition. A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 CFR § 718.304 (2007), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment, 30 U.S.C. § 902(f), 20 CFR § 718.204(b) and (c) (2007). The regulations provide five methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and, (5) lay testimony. 20 CFR § 718.204(b) and (d) (2007). Lay testimony may only be used in establishing total disability in cases involving deceased miners, and in a living miner's claim, a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony. 20 CFR § 718.204(d) (2007); *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-106 (1994). There is no evidence in the record that the Claimant suffers from complicated pneumoconiosis or

cor pulmonale. Thus, I will consider pulmonary function studies, blood gas studies, and medical opinions. In the absence of contrary probative evidence, evidence from any of these categories may establish disability. If there is contrary evidence, however, I must weigh all the evidence in reaching a determination whether disability has been established. 20 CFR § 718.204(b)(2) (2007); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986).

Neither of the arterial blood gas studies resulted in qualifying values. Thus, I cannot find disability based on the arterial blood gas studies.

All of the pulmonary function studies did result in qualifying values. However, I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1-154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131, 1-133–134 (1986). Little or no weight may be accorded to a ventilatory study if the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945, 1-946–947 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547, 1-551 (1981). In this case, although all of the pulmonary function studies provided qualifying results, all were invalid due to poor or variable effort by the Claimant. I, therefore, find that they are insufficient to establish the presence of a disabling pulmonary impairment.

Finally, none of the physicians provided an unequivocal opinion as to the severity of the Claimant's obstructive impairment, or stated that the Claimant is disabled by a pulmonary impairment. Thus, I cannot find total disability based upon the medical opinion evidence, either.

Although the Claimant has testified that he would be unable to return to his employment, I cannot base a finding of disability solely on his testimony. The current regulations state that unless otherwise provided, the burden of proving a fact rests with the party making the allegation. 20 CFR § 725.103 (2007). Hence the burden of proof on the allegation that the Claimant has a totally disabling pulmonary or respiratory impairment rests with the Claimant. Considering all of the relevant medical evidence in the current claim, separately and together, I conclude that the Claimant has failed to establish that he is totally disabled by a pulmonary or respiratory impairment. Thus, he cannot show that he is entitled to benefits.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO BENEFITS

Because the Claimant has failed to meet his burden to establish that one of the applicable conditions of entitlement has changed since the denial of his previous claim became final, he is not entitled to benefits under the Act.

ATTORNEY FEES

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act, 30 U.S.C. § 932. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

ORDER

The claim for benefits filed by the Claimant on August 4, 2003, is hereby DENIED.

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ALICE M. CRAFT
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the Administrative Law Judge's Decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the Administrative Law Judge's Decision is filed with the District Director's Office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, D.C., 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, D.C., 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the Administrative Law Judge's Decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).